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belonged by nationality; and as regards commercial contracts, by the *lex loci contractus*. By the "national law" or "the law of the place of contracting" the Italian law understands the internal law of the foreign state to the exclusion of its rules of the conflict of laws.¹¹ In other words, it selects the rule of law that shall govern the case, relying solely upon its own judgment, without reference to the views entertained by the foreign legislator. In so doing it takes an attitude which is sound from the standpoint of theory and which is in conformity with the requirements of practical convenience.¹² If this is the interpretation of the Italian rules of the conflict of laws it would seem to follow *a fortiori* that in the determination of the preliminary question upon which the application of the foreign law depends,—whether the transaction is civil or commercial—the Italian legislator must have had reference to the distinction made by his own law.

E. G. L.

ACQUISITION OF DOMICIL IN EXTRATERRITORIAL COUNTRIES

After great and protracted difficulty in finding either legal or factual justification for the doctrine, the English courts in the case of *Casdagli v. Casdagli* (1919, H. L.) 120 L. T. Rep. 52, have finally come to the conclusion that an Englishman can establish a domicile in a country granting extraterritorial rights to foreigners. The case is doubly interesting in that it brings the English law on the point into harmony with conclusions reached some time since in the American courts, and in that the development of the doctrine shows strikingly the influence which the jurists sometimes exert on the decision of cases in the courts.

This so-called "extraterritorial domicile" first came up for discussion in *Maltass v. Maltass*,¹ where Dr. Lushington, relying on the famous case of *The Indian Chief*,² expressed the opinion that "every presumption was against the intention of a British Christian voluntarily becoming domiciled in the dominions of the Porte," because of the "total and entire difference of religion, customs and habits." But the decision there went off on the ground that under treaty provisions an Englishman's will made in Turkey might be good. The question

¹¹ Cass. Rome, Jan. 1906, and App. Rome, Dec. 1 (1906), 34 Clunet, 1205.

¹² (1910) 10 COLUMBIA L. REV. 197 ff., 205 ff.; (1918) 27 YALE LAW JOURNAL, 511 ff., 524 ff.

¹ (1844) 1 Rob. Eccl. 67.

² (1800, Eng. Adm.) 3 C. Rob. 12. Lord Stowell's language was: "In the western parts of the world alien merchants mix in the society of the natives; access and intermixture are permitted; and they become incorporated to almost the fullest extent; in the East, from the old times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were."

was not presented for direct decision until *In re Tootal's Trusts*,³ a case involving an Englishman's domicile in China, in its relation to a legacy duty. Justice Chitty there decided that the establishment of such a domicile was an impossibility. His grounds were four: (1) that domicile was a concept of law, the relation which the law creates between an individual and a particular locality or country, and that existence of a domicile of choice was an inference which the law drew from the fact of a man voluntarily fixing his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time; but (2) that a British community in an extra-territorial country is not such a locality or country; (3) that an extra-territorial country is neither a sovereign territorial power nor a colony—for which reason the doctrines of Anglo-Indian domicile were inapplicable; and (4) that the immiscible nature of Oriental and Occidental races raises a strong factual presumption against any individual's intention to become domiciled in such a country.

Since that case,—and that of *Abd-ul-Messih v. Farra*,⁴ which followed it—the question has been twice before courts in the United States, and both times resulted in the opposite conclusion. Both cases concerned the establishment of a domicile in China.

In *In re Young John Allen*⁵ Wilfley, J., put his decision on the ground that an extraterritorial country is—under a fiction—"presumed" to be the territory of the country enjoying extraterritorial rights, and that the doctrine of immiscibility is to-day no longer applicable. He also adopted the arguments of Piggott⁶ and Hall;⁷ that ordinary domicile implies subjection to the territorial law; that the lack of this element in a domicile in an extraterritorial country does indeed make it anomalous, but that expediency demands its recognition.

In the second case, *Mather v. Cunningham*,⁸ the Supreme Court of Maine adopted in the main the theory of delegated authority first advanced by Huberich.⁹ Judge Spear there casts the law into a new,

³ (1883) 23 Ch. D. 532; 11 Clunet, 85.

⁴ (1888, P. C.) 13 A. C. 431; cf. also *The Derfflinger* (No. 1) (1916) 1 Br. & Col. Prize C. 386, in regard to commercial domicile.

⁵ (1907) 1 AM. J. INT. LAW, 1029.

⁶ *Extraterritoriality*, 228, 230, 232, 233. Piggott also maintains that "locality" and "community" are interchangeable terms. A community must be a community which inhabits a country or a definite locality. Undue importance ought not to be attached to the word.

⁷ *Foreign Jurisdiction of the British Crown*, 184-186.

⁸ (1911) 106 Maine, 115, 75 Atl. 323.

⁹ (1908) 24 L. QUART. REV. 440. His theory is that the law regulating the personal status of a man must be that of the governing power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing power as to be in fact the law of the land. The personal law of nationality of the privileged foreigners operates, within the territory of a country granting extraterritorial rights, only by the consent of the territorial

sane mold: an American citizen can acquire a domicile in an extra-territorial country according to the ordinary principles of domicile, unless as a matter of express legal prohibition it be made impossible for him, in his position, to acquire such a domicile.¹⁰ Now, with the case of *Casdagli v. Casdagli*, in the House of Lords, the rule of *In re Tootal's Trusts* is wholly overthrown, and the English law brought into line with the American. The opinions in this latest case have developed no new theory as a foundation for the decision; they follow closely the line of reasoning in *Mather v. Cunningham*. But the question is again on the carpet; and the old query recurs: what is the soundest theoretical justification for the undoubtedly sound rule?¹¹

Any discussion must necessarily rest on one's conception of the nature and function and content of the legal concept *domicil*. It seems clear at the outset that "domicil" enters into the law of any given forum in at least three ways which, though related, are nonetheless distinct. (1) On the one hand "domicil" is the generic term for certain sets of facts which call into operation certain of the forum's *local* rules of law. In what county of this state shall a partnership be taxed?¹²

(2) On the other hand, domicile "determines jurisdiction": local, and international,—and, indeed, under our Constitution, interstate as well.¹³ In its effect on local jurisdiction domicile perhaps belongs

sovereign, and therefore becomes a true part of the local law. Hence the acquisition of a domicile in such a country is governed by the same principles of law as the acquisition of a domicile in other countries.

¹⁰ Judge Spear seemed to have in mind the possibility that the United States might pass a law to prohibit American nationals from becoming domiciled in extraterritorial countries. To make such a reservation express seems, however, to give it undue and misleading stress: misleading in that it may suggest a difference between acquisition of this and that of any other sort of domicile. Rules of private law, in this or any other matter, give way to those of public law; and there is no more occasion here than in any other matter to qualify the statement of a rule of private law by such a self-evident exception.

¹¹ A very useful article by Dickinson, *The Domicil of Persons Residing Abroad under Consular Jurisdiction*, may be found in (1919) 17 MICH. L. REV. 437, discussing and criticizing, with an excellent review of the authorities, the Court of Appeal decision in *Casdagli v. Casdagli*, which the instant case reverses. Cf. also (1918) 34 L. QUART. REV. 196.

¹² In American states the question of "local" rules of law and their validity must of course include that part of the local law which is derived from the federal Constitution. It is a part of the law of *each state*, with respect, for instance, to taxation, that it shall not deprive a person of his property without due process of law as determined by the Supreme Court. With this limitation, the argument in the text applies to each of our states equally as if they were true sovereign powers.

¹³ Here again, the federal Constitution at first sight complicates the application of the argument to our states among themselves. This is, however, only superficial. For recognition of judgments obtained in other states, though compulsory upon a forum under the full faith and credit clause, is nevertheless a true pro-

primarily in the first class; it involves local rules only; the question is: are the facts such as under our local law give *this court* power to hear and determine and by its finding to bind the parties, *throughout this state*?¹² The plaintiff is suing for divorce: is he "domiciled" here? Shall we entertain his suit?

But domicile in its effect on international jurisdiction is a horse of another color. Another, a foreign forum has acted, heard and decreed. Were the facts on which it "took jurisdiction" such that we shall refuse reëxamination of the issues, admit the foreign decree as an operative fact which fixes legal relations before this court of ours? When that forum divorced this man for itself, did it divorce him for us too?¹³

(3) And finally, domicile enters the law as a test for determining what body of foreign local rules the forum shall in a given case adopt and apply to regulate a given situation: "what law governs the administration of personal property?"

In these considerations there is nothing new. But a restatement of them serves to bring out a point sometimes overlooked: that in each case *domicil* represents a state of facts to which *the forum* in settling a cause either does or does not attach legal consequences; that the question of *whether* any *legal consequences* at all are to be attached by that forum—i. e., of whether the facts constituting "domicil" are, in the forum, *operative* facts—is a matter for the forum itself to determine; as is also, necessarily, the question of *what* any such legal consequences shall be. And as a corollary to these things: that it is for the law of the forum, and for that law only, to decide exactly *what* those *facts* may be which make up this *domicil* to which the legal consequences are to be attached.¹⁴ And this if it be sound, is believed to offer a satisfactory explanation, in theory, of the rule of *Casdagli v. Casdagli* and the American courts.

The forum is to determine what facts are operative, and what the operation of those facts shall be. To be rational, that determination must proceed along the lines of some policy. If that policy can be found, and can be shown to cover the acquisition of domicile in "extra-

vision of the law of each forum. So also is any denial of the power to recognize such a "foreign" judgment, as where it has been rendered by a court which has acted against a defendant without due process of law. And within the borderland, where recognition depends on "comity," it is obvious that the individual law of each state determines the recognition or non-recognition of the foreign action, as operative under the local law. Cf. also 28 YALE LAW JOURNAL, 67, 579.

¹⁴ It is assumed in this paper, for convenience, that the same set of facts which in a given forum constitute domicile in one of its aspects constitute it likewise in all. But it will be observed that any forum may apply the term to cover different sets of facts according to the consequences sought to be attached: e. g. that "domicil" for purposes of international jurisdiction may require facts additional to those required to make up that "domicil" which gives local jurisdiction.

territorial countries," just as it covers normal cases of acquisition of domicile, then the normal rule to which the policy has given rise should, in the absence of peculiar difficulty, be applied here as elsewhere. What is the policy?

Why do we ever determine legal relations, property or personal, by *domicil*? For instance, in the conflict of laws? Why do we not apply in every case the local law of the forum? Surely by statute or judicial determination the forum has the *power* to apply its own local rules throughout, if it so desires, and to make its determination in accordance with that local law binding and effective within its own territorial limits. If the forum ever looks to foreign rules to determine, e. g. the distribution of a decedent's personal property, it is because of conceptions— independent or inherited—of the forum's own convenience; and because of the forum's own idea of the justice of the case. A man's life is normally spent, his children normally brought up, his and his family's social relations normally shaped in the society in which he has his permanent home. It has therefore seemed wise to our fathers to standardize this fact, to turn over to that society—*inter alia*—the decision of whether his family should be dissolved by divorce. This, through ideas of justice. So an English forum will refuse to entertain a husband's suit for divorce, where the plaintiff has his domicile outside of England. But to enforce the rule, there must be some way of knowing where that permanent home is located. For convenience's sake then, in order to apply its own rule, the forum fixes a party's domicile: at the place in which he takes up residence *facto et animo*.¹⁵ That is, the forum defines the operative facts which make up domicile. Given these operative facts, the legal consequences attach, and attach *by the law of the forum*. What are these facts? Residence in some state's territory, first; and second, a certain intention; no more. Once these two are determined to exist, what difference does it make whether the permanent home turns out to be Oregon or China?

Some courts have felt it necessary to examine further, into whether the person concerned had, *by the law of the place of residence*, acquired a domicile there. Some writers have felt that such inquiry must be made, because *domicil* was a relation created by law between a person and a particular locality or country, or between a person and the law of a state or country, and therefore not to be acquired until that law

¹⁵ It is not desired here to take up the question of just what manner of intention a person must have, in addition to the fact of residence, in order to acquire a domicile of choice. It is enough that in any one forum an intention of some one definite content is required. Whatever the particular requisite content of the *animus* may be, it is solely the *animus* and the *factum* which are operative facts. All else—personal interests in the locality, social relations—of which relation to the local *law* is but one phase—"inherent" miscibility or immiscibility, are facts merely *evidential* to prove the *animus*, and of little value when, without reference to them, the *animus* is clearly shown.

recognized the relation. Such views are believed to be unsound. So far as domicile has meaning in the law, it is believed, as indicated above, to be rather a creation of each forum, wholly a means (well or ill-chosen) for regulating, according to justice and convenience, suits which deal with people resident outside the forum. The *convenience* is believed to lie for each forum largely in the fact that the other forums of the Anglo-American world employ this same means to this same end; and the *justice* is believed to be found, if at all, in the conception that it is fair to regulate a man's affairs and relations according to the ways of the society in which that man has taken up his life for good and all, the ways according to which he may perhaps be taken to have shaped his mind and expectations. But such shaping of the individual's expectations follows—normally, in fact,—quite irrespective of whether or not he has by the local law of his residence acquired a domicile there, as that law understands domicile. And surely when the forum chooses the existence of "domicil" as a test of the applicability of certain rules, the "domicil" in mind is the concept known to the forum, "domicil" as understood by the forum's law.

Why, then, should the forum vary from its general test when that test shows the domicile to be in a country which recognizes extraterritorial jurisdiction? If a man has in fact made his permanent home in such a country, then the facts rebut presumptions of immiscibility, and the reasons for regarding that country as the party's domicile apply. Nor does there appear any inconvenience, practical or theoretic, in applying the rules of law of such a domicile,—the dispositive provisions. Here is a case, let us say, of a sort which the forum feels it fair to regulate in this standardized fashion, according to the usages of the place of a man's permanent home. That permanent home has been determined. What are the usages there? That again is a question of fact. Shall we call witnesses to testify to customs—customs, which are hard to observe, and harder to formulate in words? Again the process of standardization is employed: customs, certain fundamental ones of them, are found crystallized in the local law of the country; these crystallized customs are more readily found, more easily understood, more general of application than the others. These we shall apply.

But suppose that by the local foreign law an alien residing—even permanently—in the country, is subject in such matters to his law of origin, or nationality, or whatnot. Here is the point of objection for those who require for domicile a relation of the law of the country to the individual concerned. The only answer is found on the one hand in the reasons advanced above for referring to the *lex domicilii* at all, and on the other in the law's general policy of standardization. A man's expectations are shaped by what happens to his fellows in the community in which he lives: as he sees estates distributed, as he

sees marriage about him in the making and the unmaking, so—if the case for domicile be sound at all—he molds his thoughts as to his own property and family. And the normal man is not a lawyer, nor learned in that law of aliens which—on the books—would refer his own case to the rules of his place of origin. Therefore the forum should indulge no such reference, but should apply the rules amid the operation of which that man has lived.

But suppose, again, that there is a whole community of aliens, living unto themselves, governed, apart from the general law, in civil or even in criminal matters, by rules of their own? Here falls the case of an extraterritorial community. The test above described is applicable. The larger society itself recognizes the smaller; to the little society of foreigners it delegates the power to govern themselves, by rules in accordance with those of their home country; and such rules the greater society incorporates as its own law for members of the little society. And the rules whose operation the member of the extraterritorial society sees in their effect around him, which represent his expectations, are these incorporated rules.¹⁶

The dispositive provisions of the local law of the "extraterritorial domicile" are therefore to be found first, and broadly, in that portion of the greater society's law which, as regards the members of the little society, makes a blanket incorporation of the little society's own rules; and second, exactly and for specific application, in those rules of the little society itself for the disposition of property, etc., which it has made (or had made for it) in accordance with the laws of its home country.

It is believed, therefore, that every reason, practical or theoretic, of convenience or of fairness, which makes for the recognition of any foreign domicile, and for reference to its local laws to determine an individual's legal relations before the forum, makes equally for like

¹⁶ It will be observed that the conclusion here reached will not be affected even if one follow Dickinson (*ubi supra*, note 11) in his rejection of the theory of delegated authority. The expectations are the same, and their standardized expression (and basis) is the same, whether such expression derive its legal force from the local territorial sovereign, or the national sovereign at home.

It may be objected that this solution leads necessarily to *renvoi* in one or the other of its two forms: that the forum is referred to the country granting extraterritorial rights, only to be thrown back upon its own law; or else to be bounced still further, into the law of whatever country the community belongs to, of which the individual in question is a part. This is in practice true. So few of the cases are reported, so little of the law under which those enjoying extraterritorial rights actually live, is available in definite form, that the forum must almost necessarily examine the law of the home country as *evidence* of what the law of the group in question is. But none of the difficulties of the *renvoi* doctrine are here involved. There is no question that what is being sought is wholly and solely the local dispositive rule of the group; and the reference on to the home law is solely for purposes of evidence.

recognition of and reference to the law of an "extraterritorial domicil." And it is believed that the same holds true equally of the recognition of domicil in an extraterritorial country, in regard to any other of the aspects of domicil.

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NOTES IN PASSING

Perhaps nowhere in the law is there a problem more perplexing to theory, nor one where the decision of a case reflects more sensitively the theory on which the court proceeds, than the matter of the limitation of actions. In *Garabedian v. Avedisian* (1919, R. I.) 105 Atl. 516, the court, after some discussion of conflicting authorities, declared its view that "a judgment is not a contract in any proper sense of that term, and that the rule by which statutes of limitation are tolled by a new promise or part payment does not apply to judgments." Suit had been brought *on a judgment* more than twenty years after it was rendered, but less than twenty years after certain part payments. Recovery was denied.

Why, when a new promise is made, to pay an old contract claim,¹ does the statute start to run anew from the date of the new promise? This seems to be the effect of such a promise, whether or not the statute has already run so as to be a bar. But does suit lie on the old claim or the new? On this the courts conflict. If Massachusetts is sound, in holding the new promise made *after bar* to be enforceable only according to its own terms²—then we are dealing here not at all with a "revival" of an old obligation, but with the *creation* of a new and different one. It is the new promise, not the old, which (up to the limit of the old debt) measures the incidents of the promisor's new duty; the existence of the unpaid debt is merely something in the nature of consideration: one sort of inducing cause for a promise, of a sort which makes the latter binding. In simpler language: an old, unpaid debt, whether barred or not, plus a new promise, are the *operative facts* which create a new duty on the promisor, a duty measured by the new promise. This is believed to be the sounder explanation of the results obtained. And it is believed to be good policy, to allow these facts—unpaid debt and new promise—to create such a new substantive duty to pay.

This leads, indeed, to something of an anomaly in our law: a power in a debtor to confer on his creditor (e. g. after the statute has run)

¹ It is not desired to discuss here whether part payment has this operation because it implies a new promise *in fact*; it is assumed, for convenience' sake, that the same principles apply to both forms of "removing the bar of the statute."

² *Gillingham v. Brown* (1901) 178 Mass. 417, 60 N. E. 122.